



Federal Communications Commission  
Washington, D.C. 20554

MAY 9 1997

The Honorable Tom Harkin  
United States Senate  
731 Hart Senate Office Building  
Washington, D.C. 20510-1502

Dear Senator Harkin:

Thank you for your letter of April 11, 1997, on behalf of your constituent, Thomas J. Engberg, regarding the Commission's policies with regard to licensing of 931 MHz paging systems. Mr. Engberg expresses concern that his paging application will not be granted.

On February 20, 1997, the Commission released a Second Report and Order and Further Notice of Proposed Rule Making in WT Docket 96-18/and PP Docket 93-253, which adopted rules governing geographic area licensing for Private Carrier and Common Carrier paging licenses and established competitive bidding procedures for those systems. For your convenience and information, enclosed is a copy of the Press Release concerning the Second Report and Order and Further Notice of Proposed Rule Making, which includes a summary of the principal decisions made. Specifically, all mutually exclusive applications for non-nationwide Common Carrier Paging licenses and exclusive non-nationwide Private Carrier Paging channels will be subject to competitive bidding procedures. Additionally, all pending mutually exclusive applications filed with the Commission on or before February 20, 1997, will be dismissed.

The Commission's interim paging freeze did not require prior issuance of a Notice of Proposed Rule Making. Indeed, the Commission has imposed freezes in a number of other proceedings to facilitate the transition to geographic licensing and auctions, including Multipoint Distribution Service, 800 and 900 MHz Specialized Mobile Radio (SMR) Service, Location and Monitoring Service, 220 MHz Service and 39 GHz Service. Our decision in these proceedings to suspend acceptance of applications while the related rulemaking was pending advances two critical goals -- preservation of our ability to assign licenses through auctions, and deterrence of license fraud and speculation. In particular, we are concerned that the potential benefits of geographic area licensing, with competitive bidding used to select from among competing applicants, would be undermined by continuing to invite site-specific applications for "free" spectrum on a first-come, first-served basis.

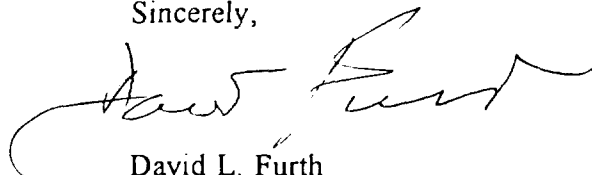
Assigning frequencies by auction, in turn, helps deter fraud and speculation and ensures that this valuable public resource is assigned rapidly and efficiently to the parties who value it the most, rather than given away to the first party who files its application with the Commission. The Commission has stated its belief in other contexts (such as Specialized Mobile Radio) that auctions will minimize administrative or judicial delays in licensing, particularly in comparison to other licensing methods such as comparative hearings, lotteries (which are specifically prohibited by the statute if the service is auctionable), or "first-come, first-served" procedures.

The Commission's newly adopted rules to auction paging frequencies is consistent with Section 309(j) of the Communications Act, which sets forth certain criteria for determining when auctions should be used to award spectrum licenses. Pursuant to these criteria, auctions are to be used to award mutually exclusive initial licenses or construction permits for services likely to involve the licensee receiving compensation from subscribers. The statute also requires that the Commission determine that auctioning the spectrum will further the public interest objectives of Section 309(j)(3) by promoting rapid development of service, fostering competition, recovering a portion of the value of the spectrum for the public, and encouraging efficient spectrum use.

Moreover, the Commission has taken a number of steps to ensure that paging providers that are small businesses are not adversely affected by the transition to geographic area licensing and the use of competitive bidding procedures to award paging licenses. Additionally, the Part 90 shared paging channels will not be auctioned; instead they will be licensed on a site-by-site basis. We are establishing licensing areas of a size that will provide realistic bidding opportunities for small and medium-sized operators. We have also adopted special provisions in our competitive bidding rules for small businesses to facilitate their participation in the auction process, including bidding credits and installment payment provisions. In the Further Notice of Proposed Rule Making, we have proposed to allow paging licensees to partition their licensing areas in order to promote quicker build-out of small markets and rural areas.

Thank you for your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Furth", written in a cursive style.

David L. Furth  
Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

Enclosure

TOM HARKIN

100 224 4251  
100 202 271 2431  
Tom Harkin, United States Senator

# United States Senate

WASHINGTON, DC 20510-1502

April 11, 1997

AGRICULTURE  
ADMINISTRATIONS  
SMALL BUSINESS  
LABOR AND HUMAN  
RESOURCES

2546

Mr. Dan Phythyon  
Federal Communications Commission  
Office of Legislative Affairs  
1919 M Street, N.W.  
Washington, DC 20554

Dear Mr. Phythyon:

I have recently been contacted by one of my constituents who has a concern over the administration's policy on the time it takes to process applications for frequency. I respectfully ask you to review the administration's policy on this issue and send me a clarification so that I might be able to respond to my constituent's questions. It would be helpful if you could mark your correspondence with my office to the attention of Kim Zimmerman.

Thank you in advance for your assistance on this matter.

Sincerely,



Tom Harkin  
United States Senator

TH/kjz  
enclosure

157426

Burlington Insurance  
408 Jefferson St. - Burlington, Ia. 52601

February 25, 1997

Mr. Tom Harkin,  
Please review the enclosed contract and memo from John Pellegrin's office. If his claims are true, the FCC is performing an illegal act concerning licenses. This will result in the loss of almost \$7,000.00 to myself and many other people who followed the rules and regulations set forth by the FCC only to be changed by them. Please look into this or forward on to a party that may assist in this matter.

Thank you for your attention in this matter,



Thomas J. Engberg  
POB 1106  
Burlington, Ia. 52601

LAW OFFICES  
*John D. Pellegrin*  
CHARTERED  
1140 CONNECTICUT AVENUE, N.W.  
SUITE 606  
WASHINGTON, D.C. 20036  
TELEPHONE (202) 293-3831  
FACSIMILE (202) 293-3836

## MEMORANDUM FOR 931 MHZ APPLICANTS

From: John D. Pellegrin

Date: February 20, 1997

Re: **Report For Paging Applicants/Processing  
Status and Strategy**

This memo is designed to bring 931 MHz paging applicants current as to the status of their applications pending at the FCC. The memo will also discuss FCC policies which have contributed to this situation, and suggested strategies and possible remedies for applicants whose applications have not yet been processed.

### Background

While we were successful in having the FCC overturn its original official freeze instituted in February 1996, the FCC has now imposed an unofficial *de facto* freeze since then. We are not aware of any applications which have been processed. Indeed, none have been dismissed, and none have been granted.

Why would the Commission do this? Where is the benefit to allow this backlog of applications to languish at the FCC? The Commission benefits because it has announced it is going to auction all remaining paging licenses in the near future, which will raise revenue for the US Treasury. The FCC will divide the country into geographic areas (roughly equivalent to the 50 states) and auction off the right to own all licenses remaining available in that particular geographic area. Obviously, the more licenses available the more valuable the geographic region, and the bigger the anticipated auction revenue for the FCC. While the Commission could theoretically limit the auctions to applicants already on file, this is not likely, if it chooses to maximize revenue.

Of course, the Commission would never admit it is higher auction prices which drives any of its policies with respect to trying to deny pending applications. But this practice is clear from the FCC treatment of licenses in auctions for other radio services, such as wireless cable (MMDS).

In order to give the FCC some justification for this policy, we have learned in our discussion

with engineering consultants that the FCC has adopted a very liberal interpretation of its rules to result in applications on file to block the processing of applications filed for other markets!

Assuming there are 30 931 MHz applications available in a given market, if 31 applications are filed, then no one applicant can be granted under the Commission's existing processing policies. However, the Commission has expanded the possibility of an application being blocked by counting applications in other markets as well as the given market. The Commission does this by applying a so-called "daisy chain" theory.

Under the daisy chain theory, if one application in a market is overlapped by one application in another market, which could be 40 miles away, the Commission takes the position that in determining if it can award the 30 licenses in either market, it will consider the applications in the given market (Market A) as well as all applications in the distant market (Market B) which is overlapped by only one application from Market A! Despite the fact that there is only one link between the markets, i.e., one channel overlap out of 30 possible overlaps, the Commission still treats the two markets as the same market for mutual exclusivity purposes. Using this new approach, it is easy to see that very few applications could ever be granted.

Compounding the problem, our research does not find any instance where the Commission has clearly delineated this policy in its prior orders or decisions with respect to the 931 MHz service. Since your applications were filed pursuant to then-existing standards, we believe the FCC's imposition of this new processing standard without any notice or advisory is arbitrary and capricious.

#### Possible Solutions

The first possible solution is for each applicant to once again turn to your elected representatives in Congress. Essentially a letter-writing campaign should focus on the unfairness of holding your applications hostage while the FCC considers changing the rules to hold an auction for the frequencies you previously applied for, in a transparent attempt to drive up auction revenues and deny potential service in the interim.

Each applicant could also hire a consulting firm to perform an engineering search of the Commission's database to see if your application is actually blocked, using the Commission's "daisy chain" approach. If it is not, there is no reason for the Commission not to grant the application. We can recommend various firms, if you wish.

It is clear that the Commission intends to withhold processing your applications until it issues new auction rules. Only then will it probably dismiss all pending 931 MHz applications. Whenever those applications are dismissed, it would seem that a legal appeal could be filed based on the unfair and improper use of this "daisy chain" approach in the processing of 931 MHz paging applications. However, we do not recommend that you wait for this likely event.

We would consider approaching the FCC for a meeting to confirm the above scenario, and to determine with particularity that the Commission is indeed using the daisy chain interpretation of the rules described above, and to see if it will change its approach. We would then consider filing an appeal of any continued FCC processing freeze and attempt at denying your properly-filed

application, under the appropriate circumstances. Unfortunately, we are unable to guarantee we can undertake such an appeal at this time, unless the resources for doing this work become available.

We have also discovered that a Commission decision is imminent regarding the pending Rulemaking proceeding which commenced a year ago and which has had the effect of imposing an application processing freeze. The FCC will undoubtedly adopt an auction licensing regime. However, if pending applications can be shown not to be mutually exclusive, then they should not be subject to any auction protocol. Once the Commission decision is released, we should have more information available as to strategy alternatives.

We realize that all applicants have been extremely patient, and we will continue to work as best we can to find some solution to this processing stalemate at the Commission. We would be glad to suggest language for letters to Congressional representatives, and your thoughts and comments regarding this memo are welcome.

**\* \* \* Law Offices of John D. Pellegrin, Chartered \* \* \***

## ON-SITE COMMUNICATIONS, INC.

## Radio Common Carrier 931 MHz Application Services Agreement

This service Agreement ("Agreement") is entered into and effective as of the date set forth on the attached signature page by and between On-Site Communications, Inc. ("On-Site") and THOMAS JAMES ENGBERG ("Client").

Whereas Client desires to retain On-Site to assist Client, on a non-exclusive basis, in preparation of applications for licenses with the Federal Communication Commission ("FCC").

Whereas On-Site desires to assist Client, on a non-exclusive basis, in preparation of such applications(s).

Now, therefore, the parties agree as follows:

1. "RISK FACTORS YOU SHOULD CONSIDER PRIOR TO PURCHASE OF SERVICES" (SEE RISK FACTORS SET FORTH IN SECTION 17).
  - A. This is not a solicitation for an investment but rather an offer to provide services for the preparation of license applications for consideration by the Federal Communications Commission (FCC). The fees charged are for services provided in the preparation of these applications.
  - B. Consulting services offered by On-Site are not to be construed as a passive investment or securities offering. Applicant must exercise individual judgment and retain additional expertise where and when needed while maintaining personal control and direction of applications(s).
2. SERVICES: On-Site, on its own and through companies with whom it contracts for the benefit of the Client, agrees to prepare and file with the FCC within any applicable time frame established by the FCC an Application for a Radio Common Carrier ("RCC") 931 MHz License. For each market, the Application to be prepared and filed by On-Site with the FCC will include any required exhibits pertaining to the Application being filed, including engineering studies, site analysis and interference studies (where appropriate), and all required information for an Application under governing FCC published rules. Client is responsible for providing information necessary to complete the Application in an accurate and timely manner, as requested. On-Site disclaims any responsibility for the completeness or accuracy of those portions of each Application that are completed from information received from the Client or for the timely receipt of such information.
3. NON-EXCLUSIVITY: Client understands and agrees that the services of On-Site set forth herein are provided on a non-exclusive basis. On-Site intends to render



the same or similar services on behalf and/or for the benefit of other clients, its principals and consultants.

4. COOPERATION OF CLIENT: Client agrees to cooperate with On-Site and all parties retained by it in obtaining the information necessary to file Client's Application(s) and take all reasonable steps requested by On-Site, its consultants, and any other parties retained by it, necessary to file and/or amend Client's Applications(s) in a timely and expeditious manner.
5. CLIENT AUTHORIZATION TO ON-SITE. Client recognizes that to prepare the necessary FCC application(s), On-Site must engage the services of various consultants, attorneys, and organizations. Client hereby authorizes On-Site to act on Client's behalf in engaging such services. Client also recognizes that On-Site will incur costs and expenses in preparing such application(s), and agrees that the "ON-SITE PREPARATION FEE" set forth on the "SIGNATURE PAGE" (p. 6) of this Agreement is NON-REFUNDABLE, unless paragraph 9.(c) becomes operative.
6. FCC FEES. Client understand that the FCC requires a filing fee for each application, to be paid to the FCC at the time of filing. Such fee is included within the On-Site fee, and On-Site shall cause the FCC filing fee to be paid.
7. CLIENT'S REPRESENTATIONS. Client represents that:
  - A. Client intends to comply with all FCC regulations and requirements concerning any and all markets for which Client may be awarded an FCC license.
  - B. Client is a U.S. citizen, 21 years of age or older, and has no felony convictions.
  - C. Client acknowledges that the FCC prohibits profiting from the transfer of certain FCC licenses prior to initial construction and operation of systems, and warrants that it is not the Client's intention to sell any Construction Permit (CP), or license obtained prior to construction and sign-on of any such system. The only price that can be charged for a CP, or paid for a CP, is the reasonable amount expended to receive the award of said CP. Further, Client understands that when he is awarded a license, FCC rules generally restrict the sale of any such license until after system has been in operation.
8. RESPONSIBILITIES OF ON-SITE. The responsibilities of On-Site shall be strictly limited to providing the services set forth in this Agreement. The Agreement does not include any post-filing service such as, but not limited to, financing, construction and operation of the system, which is the sole responsibility of the applicant. Should Client incorrectly state any material fact,

or fail to provide any required additional information, or fail to meet, for reasons undisclosed by Client to On-Site, all relevant FCC requirements, qualifications, documents, and/or amendments, Client shall be solely responsible for any FCC application(s) rejected based on such grounds.

9. **REMEDIES OF CLIENT.** Should the FCC dismiss or return any Client application based on engineering or other technical details, On-Site, at its option, will undertake one of the following remedies: (a) draft a corrective amendment to the application as necessary to meet FCC requirements and refile the application; (b) upon notification to the Client, file an application in an alternate market area; or (c) refund all fees paid by Client to On-Site relative to this application, inclusive of FCC Filing Fees. These are the sole remedies available to the Client, and Client expressly acknowledges this and agrees that these remedies are acceptable. Client further understands and agrees that On-Site shall not be liable to Client in the event that this program is terminated or substantially changed by the FCC after an application has been filed but before it has been approved by the FCC. In the event that this program is terminated by the FCC prior to the time that an application is filed, then On-Site shall refund all fees paid to it.
10. **AUTHORITY.** The individuals signing on behalf of the parties to this Agreement represent and warrant that they have full authority to execute this Agreement on behalf of such party.
11. **BINDING EFFECT.** Agreement shall be binding upon, and inure to the benefit of the parties and their successors, legal representatives and assignees.
12. **GOVERNING LAW VENUE.** This Agreement shall be construed, enforced and governed under the laws of the state of Florida, which shall have personal jurisdiction over the parties in any legal action concerning this Agreement. Client agrees to accept service of process by regular or certified mail and agrees to submit to the jurisdiction of the courts of the state of Florida based upon such service or process. Venue shall be in Broward County, Florida. In the event that litigation arises, the losing party will be liable for the legal fees and costs of the winning party.
13. **NOTICE.** Notice will be considered legally given by either party if deposited in the U.S. Mail first class, postage prepaid, return receipt requested, and mailed by either party to the address of the other party as follows as set forth in this Agreement.
14. **DISCLOSURE.** Client understands, acknowledges and agrees to the following:
  - A. Client enters into this Agreement based exclusively upon the written provisions of this Agreement and acknowledges that there were no oral

representations made by any person regarding the filing of application(s) which are not contained in this Agreement. Any other matters covered orally with the client by On-Site representatives are only the opinions of such representatives, and the client does not rely on such in purchasing these application preparation services from On-Site.

B. Client understand and agrees that Client retains the sole and exclusive right to determine the manner in which the RCC license granted will be utilized and developed. Client is responsible for all post-filing activities, including development, marketing, construction, and financing. On-Site has no obligation to provide Client with any post-filing activities, including, but not limited to, (1) updated application material reflecting any subsequent event, occurrence, information or change in information regardless of source; (2) updated engineering and legal representation or other support in connection with any FCC or other proceedings, such as the preparation of exhibits and statements in defense of Client's application or challenges by Client against any other application; (3) material exhibits for engineering in response to any request for supplemental documents or showing required by the FCC; or (4) analysis research or information concerning any other pending applications.

C. While systems operators are generally available to assist Client once a license has been granted to Client, any negotiations or contract with such system operator or operators is strictly the responsibility of the Client.

D. According to FCC regulations, some frequencies may or may not be shared when issued or, for failure to meet specific loading requirements may result in a loss of license. These rules are a matter of public record and are available. It is the licensee's responsibility to keep abreast of any changes in FCC regulation that pertain to the licensee's authorization to operate.

15. COMPLETE AGREEMENT. This Agreement represents the complete Agreement of the parties. This Agreement supersedes any prior understanding and any written or oral agreements, understanding or representations among the parties relating to the subject matter of the Agreement. No promises, statements, representation or warranties have been made or were relied upon in entering into this Agreement other than those specifically set forth herein. This Agreement as written, embodies the total understanding of the parties.
16. MODIFICATION. This Agreement may not be modified and no change to any of the provisions of this Agreement and its attachments shall be binding or enforceable unless the modification or change is reduce to writing and executed by both Client and an officer of On-Site.

17. COUNTERPARTS. This Agreement may be executed in any number of counterparts, all of this shall be deemed an original for all purposes.
18. RISK FACTORS YOU SHOULD CONSIDER IN MAKING APPLICATION FOR AN RCC LICENSE.
- A. Entry into the RCC business has associated risks. Do not apply for a license unless you are prepared to take those risks.
- B. On-Site's services are limited to the preparation and filing of a proper application for an RCC license to the FCC.
- C. The success of a system is dependent upon many variables such as market size, availability of sufficient channels, competition with other forms of telecommunications, and the efforts of the licensee.
- D. In the event a licensee does not contract with an existing system operator to provide service and facilities, the licensee may elect to construct a system. The estimates of financial commitments to construct, finance and operate a system may be greater than those projected. In such event, financing may be difficult to obtain and may require the personal commitment of the license holder.
- E. The RCC business involves some technologies with a limited track record. Technological and regulatory changes may affect RCC/FCC license opportunities and revenue potentials.
- F. Representations made by On-Site concerning potential financial returns to the license holder are only expressions of opinion by On-Site based upon projections from data which On-Site has a reasonable basis to believe are reasonably accurate at the time.
- G. Additional risk factors may exist that have not been enumerated. Accordingly, Client may desire to study this matter further or consult an attorney familiar with FCC matters before applying for a license.

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## SIGNATURE PAGE

This Signature page is an integral part of the On-Site Application Service Agreement. Your signature, below, constitutes your acceptance of all terms and conditions of this Agreement, and your acknowledgement of the risk factors and disclosure statement as contained herein.

### Application Fees

ON-SITE PREPARATION FEE  
NUMBER OF APPLICATIONS  
TOTAL COMBINED FEES  
OTHER  
TOTAL REMITTED TO ON-SITE

\$ 6296.<sup>00</sup>  
1  
6296.<sup>00</sup>  
n/a  
\$6296.<sup>00</sup>

### Form of Remittance:

Bank Wire# \_\_\_\_\_ Bank Name Farm Bank Cashier's Check \_\_\_\_\_  
Name THOMAS J. ENGBERG  
Address P.O. 11010 / 403 JEFFERSON ST  
City BURLINGTON State IA Zip 52601  
Home Phone (319) 753-9012 Bus. Phone (319) 752-6325

### Please check one of the following:

Individual ☒ Joint \_\_\_\_\_ Partnership \_\_\_\_\_ Corporation \_\_\_\_\_ Other \_\_\_\_\_

Social Security # 48317219273 Fed ID# \_\_\_\_\_

Date 11/17/95 Office # 1 Reg. Coordinator C. GRANT

Areas Desired ATHENS, GA

Signature Thomas J. Engberg

# On-Site Communications, Inc.

2745 East Atlantic Boulevard  
Pompano Beach, Florida 33062

The undersigned hereby represents and warrants that the responses to the questions listed below are true, correct and complete to the best of his/her knowledge and belief.

Applicant is: Individual X Partnership \_\_\_\_\_ Corporation \_\_\_\_\_

1. Are you a U.S. citizen? Yes X No \_\_\_\_\_
2. Have you, or any group to which you have been a party, ever had any FCC station license or permit revoked or had a license renewal denied by the FCC?  
Yes \_\_\_\_\_ No X
3. Have you ever been adjudged guilty of monopolizing, or attempting to monopolize, radio communications by any means or unfair method of competition?  
Yes \_\_\_\_\_ No X
4. Have you or any person directly or indirectly controlling you, ever been convicted of a felony by any state or federal court?  
Yes \_\_\_\_\_ No X
5. Are you or any person directly or indirectly controlling you, ever been personally a party to any pending matter pertaining to questions 2 or 3 above?  
Yes \_\_\_\_\_ No X
6. What is your Annual Income: 150K Net Worth: 100K

If you answered "Yes" to questions 2 through 5, attach a statement setting forth all the facts.

Signature Thomas J. Engberg

Complete Legal Name THOMAS J. ENGBERG

Address 408 JEFFERSON BURLINGTON, IA 52601

If applicant is a "Partnership", include a list of all partners, citizenship, street address, and percentage of partnership owned.

If applicant is a "Corporation", include a list of all directors, officers, citizenship, street address, and state of incorporation.

Chart 1

The Cost of \$6,896 is For The Preparation Of An Application To Be Filed With the Federal Communications Commission.

Filing a license application, including all forms and exhibits, requires the preparation of a comprehensive government issued and required application and related services which may include:

- Engineering
- Interference Studies
- Transmitter Tower Site Options
- Terrain Studies
- Service Coverage Maps
- Environmental Impact Statements
- Pre-filing Review/FCC Interface
- Post-Filing Amendments
- Application Assembly Time
- Document Courier Service